

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 122 of 1995

in

COMPANY PETITION No 164 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

G.S.F.C.

Versus

O.L. OF VASANI WIRE PRO P.LTD

Appearance:

MR RD DAVE for Petitioner
OFFICIAL LIQUIDATOR for Respondent No. 1
MR AC GANDHI for Respondent No. 2
MR HS MUNSHAW for Respondent No. 3
MR ASIM J PANDYA for Respondent No. 4

CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 4/2/97

ORAL JUDGEMENT

Rule. Service of Rule is waived by the Official Liquidator for respondent No. 1, learned advocate Mr AC

Gandhi for respondent No. 2, learned advocate Mr HS Munshaw for respondent No. 3 and learned advocate Mr Asim J Pandya for respondent No. 4.

This Judge's summons has been taken out by Gujarat State Financial Corporation (for short "the Corporation") praying that the Official Liquidator be directed to handover possession of land, building, plant and machinery, etc. belonging to M/s Vasani Wire Products (P) Ltd. (in liquidation, which has been referred to hereinafter as the 'Company') which were sold to M/s Y. Singh Associates at an auction. It has also been prayed that the sale effected by the applicant be confirmed.

In support of the above referred Judge's summons, an affidavit has been filed by Manager of the Corporation giving details with regard to facts and circumstances in which the above referred assets of the Company were sold. He has submitted in his affidavit that the applicant-GSFC had given loan to the Company to the tune of Rs. 18,00,000/-. The said amount lent to the Company was to be repaid alongwith interest thereon in a particular manner. The Company was also given financial assistance by State Bank of India and Gujarat Industrial Investment Corporation Limited (for short "GIIC").

Financial position of the Company was not good and, therefore, the Company could not repay its dues to the applicant Corporation and other creditors. In the above referred circumstances, Company Petition No. 164 of 1989 was filed in this Court wherein it was prayed that the Company be wound up. Ultimately, by an order dated 6th March, 1990 the Company was ordered to be wound up and in pursuance of the said order, the Official Liquidator attached to this Court had taken possession of the assets of the Company.

Thus, the Official Liquidator is having possession of all assets of the Company at present.

As per provisions of Section 29 (1) of the State Financial Corporations Act (hereinafter referred to as "the SFC Act"), the applicant-Corporation was desirous of selling assets of the Company over which charge was created by the Company so as to safeguard interest of the applicant-Corporation. Ultimately by a public auction assets over which charge was created in favour of the Corporation were sold in favour of M/s Y. Singh Associates. In Company Petition No. 164/89, Company Application No. 52/90 was filed by Indore Steels & Iron

Mills Ltd. wherein it was prayed that the applicant-Corporation be restrained from selling assets of the Company and it was also prayed that the Corporation be restrained from handing over possession of assets of the Company to any person. Ultimately by an interim order passed on 21st March, 1990 in the above referred Company Application, this Court had permitted the applicant Corporation to sell assets of the Company.

In pursuance of the above referred order, the applicant Corporation had taken recourse to provisions of Section 29(1) of the SFC Act and by giving a public advertisement invited offers from willing buyers so that assets of the Company over which charge was created in favour of the Corporation can be sold.

In pursuance of the first advertisement dated 28th February, 1990 published by the Corporation, no response was received by the Corporation and, therefore, another advertisement was issued on 19th December, 1993. Only two offers were received in pursuance of the second advertisement. The highest offer was for Rs.11,11,111/-. As the applicant Corporation was of the view that the amount offered was inadequate, both the offers were not considered and the Corporation had given third advertisement on 10th February, 1995. In pursuance of the said advertisement three offers were received. Though advertisements inviting offers were given in three newspapers having very good circulation viz. The Times of India, Gujarat Samachar and Sandesh, only one offer was received. The said offer was for Rs. 15,00,000/and it was given by M/s Y. Singh Associates. The tender committee of the Corporation was of the view that the amount offered by M/s Y. Singh Associates could be increased and, therefore, the committee had invited a representative of M/s Y.Singh Associates for negotiations. Ultimately, M/s Y. Singh Associates raised the offer to Rs. 17,51,111/-.

Looking to the above referred circumstances and the fact that in pursuance of first advertisement, no response was received by the applicant and even at the second attempt hardly Rs 11,11,111/- were offered, the Corporation was of the view that the offer given by M/s Y. Singh Associates was reasonable and the Corporation ultimately decided to sell the plant and machinery, etc. of the Company to M/s Y. Singh Associates.

In the above referred circumstances, Company Application No. 122/95 has been filed by the applicant Corporation praying that the Official Liquidator be

directed to handover possession of the assets of the Company which have already been sold by the applicant Corporation to M/s Y. Singh Associates. Learned advocate Mr Rajesh Dave appearing for the applicant-Corporation has submitted that as per provisions of Section 29 (1) of the SFC Act, it is not necessary for the applicant Corporation to take any prior permission before effecting sale of the assets of the Company over which charge in favour of the applicant Corporation had been created. He has further submitted that only for sake of abundant caution the applicant Corporation has prayed that the applicant be given permission to effect the sale. He has further submitted that as the Official Liquidator is in possession of all assets of the Company, which has been directed to be wound up, it was necessary for the applicant to approach this Court with a prayer that the Official Liquidator be directed to handover possession of the assets in question either to the applicant or to M/s Y. Singh Associates to whom assets of the Company have been sold by the applicant in pursuance of its power under section 29(1) of the SFC Act.

During pendency of the above referred application given by the applicant-Corporation, Company Application No. 178/96 has been filed by Aeromatic Engineering Pvt. Ltd. praying that assets over which charge has been created in favour of Corporation be sold to Aeromatic Engineering Pvt. Ltd. as Aeromatic Engineering Pvt. Ltd. is ready and willing to offer Rs. 23,00,000/- to the Corporation. It has been submitted by Senior advocate Mr Mihir Thakore appearing for Aeromatic Engineering Pvt. Ltd. that the said Company is still ready and willing to offer higher price if the assets of the Company can be sold to the said Company.

Senior advocate Mr Mihir Thakore has submitted that the amount offered by M/s Y. Singh Associates is only Rs. 17,51,111/- whereas Aeromatic Engineering Pvt. Ltd. has offered much more than what was offered by M/s Y. Singh Associates. He has submitted that in the interest of the Company as well in the interest of creditors and workmen of the Company, it would be just and proper to permit Aeromatic Engineering Pvt. Ltd. to negotiate the matter pertaining to sale of assets of the Company with the Corporation.

Senior advocate Mr Mihir Thakore has further submitted that assets of the Company were valued approximately at Rs. 13,71,000/- in 1988 and, therefore, it would not be just and proper to sell the said assets

of the Company to M/s Y. Singh Associates for Rs. 17,51,111/- as the price offered by M/s Y. Singh is much on lower side. In the above referred circumstances, especially when Aeromatic Engineering Pvt. Ltd. is prepared to offer Rs. 23,00,000/- or even more for the assets of the Company, Senior advocate Mr Mihir Thakore has submitted that the Corporation should not be permitted to sell assets of the Company to M/s Y. Singh Associates.

Senior Advocate Mr Mihir Thakore has also submitted that it would not be open to the Corporation to effect sale of the assets of the Company without permission of this Court for the reason that the Company has been ordered to be wound up and in the winding up proceedings the Corporation cannot have a right to sell assets of the Company over which charge had been created in favour of the Corporation under provisions of Sec. 29(1) of the SFC Act. He has submitted that as per provisions of Section 456(2) of the Companies Act all properties and effects of the Company are deemed to be in the custody of the Court from the date of the order for the winding up of the Company. He has, therefore, submitted that assets which are subject matter of these applications are in custody of the Court and it becomes duty of the Court to see that the highest possible price is fetched by the Company or the Corporation while disposing of the said assets.

In the circumstances, he has submitted that assets of the Company should not be permitted to be handed over to M/s Y. Singh Associates but the Corporation should be directed to negotiate the matter pertaining to sale of the assets with Aeromatic Engineering Pvt. Ltd. as it would be in the interest of the Company, the Corporation itself and workmen, creditors and shareholders of the Company. He has relied upon certain authorities to show that the Company Court should take due care to see that interest of the Company is not adversely affected while disposing of its assets.

On the other hand, learned advocate Mr Soparkar appearing for M/s Y. Singh Associates has submitted that as per provisions of Section 29(1) of the SFC Act it is open to the applicant-Corporation to sell assets of the Company over which charge has been created. He has submitted that the Corporation is a secured creditor and as per settled legal position, a secured creditor can very well remain outside the winding up proceedings and can effect sale of the assets over which charge has been created in its favour. He has submitted that in the

instant case the Corporation is a secured creditor and as per provisions of Sec. 29(1) of the SFC Act it is open to the applicant-Corporation to effect sale of assets over which charge was created in its favour.

He has also submitted that the Corporation had given 3 advertisements at different points of time. He has submitted that Aeromatic Engineering Pvt. Ltd. had never come forward to purchase the assets of the Company in pursuance of advertisements published by the applicant-Corporation. He has drawn my attention to the fact that the highest offer which was given to the Corporation was that of M/s Y. Singh Associates. Though initial offer given by M/s Y. Singh Associates was only Rs.15,00,000/-, after negotiations, the offer was raised to Rs. 17,51,111/- and no person had ever offered this much amount for the assets in question. He has submitted that the tender committee of the applicant-Corporation had finalised the deal and, therefore, the sale had become final in favour of M/s Y. Singh Associates.

He has submitted that simply because in the agreement entered into between the applicant-Corporation and M/s Y. Singh Associates, a term was incorporated whereby it was provided that permission of the Company Court would be taken, if necessary, it would not mean that permission of this Court should be taken for handing over possession of the assets. He has submitted that when the applicant was exercising its power under section 29(1) of the SFC Act, it is not at all necessary for the applicant to take any permission from this Court as no such permission is required but perhaps for sake of abundant caution the Corporation has filed the present application seeking permission of this Hon'ble Court for effecting sale of assets of the Company.

He has, therefore, submitted that permission as prayed for in Company Application No. 122/95 be granted to the applicant so that M/s Y. Singh Associates can take physical possession of the assets which have been purchased by them.

Learned advocates appearing for the concerned parties have relied upon several authorities. I am not referring to the said authorities for the reason that all those authorities were considered by this Court while rendering judgment in the case of GSFC Vs. Official Liquidator, Himalaya Tools (India) Pvt. Ltd. and others reported at page 503 of (1996) 1 Company Law Journal, wherein it has been held by Division Bench of this Court that no such permission is required if assets of any Unit

are to be sold in pursuance of powers under section 29(1) of the SFC Act.

The entire controversy appears to have arisen in the instant case because of one of the terms incorporated in the advertisement issued by the applicant Corporation while inviting offers for sale of assets of the Company.

When the applicant Corporation had given an advertisement inviting offers from the buyers for sale of assets of the Company, it was stated in the advertisement that, if necessary, sale of the unit would be subject to sanction/permission of the Hon'ble Gujarat High Court. A copy of the said advertisement has been shown to this Court by learned advocate Mr Rajesh Dave and it has been kept on record of Company Application No. 122/95. Upon perusal of the said advertisement, it is clear that the applicant-Corporation had to take permission of this Court only if such a permission was required. If no such permission was required, it was not necessary to approach this Court.

Learned advocate Mr Rajesh Dave appearing for the applicant has submitted that as per provisions of Section 29 (1) of the SFC Act, it is not necessary for the applicant-Corporation to take any permission of this Court before exercising its right to sell the assets over which charge has been created. He has submitted that Company Application No. 122/95 has been filed only for sake of abundant caution and mainly for a direction that assets of the Company which are in possession of the Official Liquidator be given either to the applicant or to M/s Y. Singh Associates in whose favour the sale has been effected.

As per law laid down in case of GSFC Vs. Official Liquidator, Himalaya Tools (India) Pvt. Ltd. and others by this Court, it is very clear that a secured creditor has an option to exercise his right to realise his securities without intervention of the Court by remaining outside the winding up proceedings. All judgments which have been cited before me by Senior advocate Mr Mihir Thakore and learned advocate Mr Soparkar had been duly considered by the Division Bench of this Court while deciding the case referred to hereinabove. Ultimately the Court had come to a conclusion that State Financial Corporation has a right under provisions of Section 29 (1) of the SFC Act to remain outside the winding up proceedings and to realise its securities.

In pursuance of ratio laid down by Division Bench of this Court in the above referred judgment, in my opinion it was not necessary for the applicant Corporation to approach this Court for taking necessary permission as it is open to the Corporation to realise the securities without intervention of the Court as per provisions of Section 29 (1) of the SFC Act.

In the instant case, the applicant-Corporation is a secured creditor desirous to have recourse to provisions of Section 29(1) of the SFC ACT by remaining outside the winding up proceedings and, therefore, it is not necessary for the Corporation to take sanction of this Court before realising its securities.

Senior advocate Mr Mihir Thakore has submitted that validity of the above referred judgment has been challenged before the Honourable Supreme Court and, therefore, ratio laid down in the said judgment need not be followed. There is no dispute about the fact that validity of the said judgment has been questioned before the Hon'ble Supreme Court but no interim order has been passed by the Hon'ble Supreme Court. Simply for the reason that validity of the said judgment has been challenged before the Hon'ble Supreme Court, I do not think that I should not follow the said judgment.

Senior advocate Mr Mihir Thakore has also urged that this matter should be referred to a larger bench as it is always open to this Court to do so. It is true that the matter can be referred to a larger bench but looking to the fact that the Division Bench of this Court had considered several judgments and only after giving anxious thoughts to all the judgments cited it had come to the above mentioned conclusion, I do not think it proper to refer the matter to a larger bench. In my opinion, looking to the facts and circumstances of the case, I should follow the judgment of the Division Bench as per the judicial discipline which is normally followed.

In the above referred circumstances, in the light of the judgment delivered in the case of GSFC Vs. Official Liquidator, Himalaya Tools (India) Pvt. Ltd. and others, it is directed that the Official Liquidator should hand over possession of the assets which have been sold by the applicant to M/s Y. Singh Associates.

Rule is made absolute with no order as to costs.

Senior advocate Mr Mihir Thakore has requested

that implementation and execution of this judgment should be stayed for sometime as his client wants to question validity of this judgment before a Division Bench. Looking to the facts and circumstances of the case, it is directed that this judgment shall not be implemented till 15th February, 1997.
